United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2082

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2082

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH FIORE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Preliminary Statement

Joseph Fiore appeals from an order entered on December 30, 1975, in the United States District Court for the Southern District of New York by the Honorable Charles E. Stewart, United States District Judge, denying without a hearing Fiore's motion to vacate the judgment of conviction arising from his entry of a guilty plea in 1957.*

Joseph Fiore pleaded guilty on December 16, 1957 before the Honorable Sylvester J. Ryan to both counts

* Petitioner alleged jurisdiction under Rule 35 of the Federal Rules of Criminal Procedure. The matter should be treated as a motion pursuant to Title 28, United States Code, Section 2255. *Hill* v. *United States*, 368 U.S. 424 (1962); *United States* v. *Huss*, 520 F.2d 598, 602-03 (2d Cir. 1975); *United States* v. *Slutsky*, 514 F.2d 1222, 1226 (2d Cir. 1975).

of Indictment Cr. 154-149, charging him with violations of the federal narcotics laws, specifically Title 21, United States Code, Sections 173 and 174. Judge Ryan sentenced Fiore to two years imprisonment on each count to be served concurrently. He then suspended the imposition of sentence and placed Fiore on probation for one day. Fiore was serving a substantial state narcotics sentence at the time.

On January 21, 1972, Fiore was convicted after trial before the Honorable Orrin G. Judd in the Eastern District of New York of distributing heroin, again in violation of Title 21, United States Code, Section 174, and was sentenced as a second offender to a term of imprisonment of twenty years without parole. This conviction was affirmed, *United States* v. *Fiore*, 467 F.2d 86 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973).

On October 31, 1974, petitioner moved to vacate the conviction which resulted from his guilty plea before Judge Ryan in 1957. He claimed that his guilty plea was invalid under Rule 11 of the Federal Rules of Criminal Procedure. In a memorandum dated December 30, 1975, Judge Stewart denied the motion without a hearing.

Petitioner is currently serving the sentence imposed upon him following his conviction in 1972 in the Eastern District of New York.

Statement of Facts

On December 16, 1957, Joseph Fiore, who was then in state custody serving a state narcotics conviction, appeared with his attorney before Judge Ryan in the United States District Court for the Southern District of New York for the purpose of entering a plea of guilty to Indictment Cr. 154-149. After the court determined that

counsel had a copy of the indictment, the following colloquy occurred:

> The Clerk: The indictment charges that on or about the 4th of February, 1956, you did unlawfully sell approximately 432 grains of heroin.
>
> On or about the 20th of February, 1956, you unlawfully sold approximately 867 grains of heroin.
>
> Do you plead guilty or not guilty?
>
> The Defendant: Guilty.
>
> The Clerk: To both counts?
>
> The Defendant: Yes.

Thereafter, the defendant's attorney made a statement to the court on behalf of the defendant and the Assistant United States Attorney made a statement on behalf of the Government. Judge Ryan then sentenced the defendant to concurrent two-year terms of imprisonment on each count and suspended the sentence, placing petitioner on probation for one day. Mindful of the fact that petitioner was then serving a substantial state narcotics sentence, the court noted that "I do not think it will serve the interests of justice to impose another sentence on this defendant." *

Some seventeen years after his conviction, and only after having been again convicted of distributing heroin and sentenced, accordingly, as a second federal offender,

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* The defendant in fact was incarcerated from 1957 until 1965 on the state narcotics offense. *United States* v. *Fiore*, *supra*, 467 F.2d at 90 n.12. As noted, he was convicted of yet a third narcotics offense in January, 1972 in the Eastern District of New York.

Fiore filed the instant motion on October 31, 1974 claiming his 1957 plea to have been invalid.*

ARGUMENT

The District Court Did Not Err in Denying Petitioner's Motion to Vacate His 1957 Guilty Plea.

It must be noted at the outset that Fiore's claim on appeal differs somewhat from that which he raised in the district court. In his moving papers, Fiore relied upon *McCarthy* v. *United States*, 394 U.S. 831 (1969), claiming that his plea of guilty was invalid because he was not informed by the court of the consequences of his plea, specifically, the possible punishment he faced upon conviction. The inapplicability of *McCarthy* having been pointed up by the district court and his remaining contentions having been properly rejected, Fiore now broadens his claim upon this appeal, alleging that "the court below made no effort to determine whether the defendant understood the nature of the charge, or that the plea was made voluntarily." (Brief at 3). In either case, it is clear appellant is entitled to no relief.

Rule 11 of the Federal Rules of Criminal Procedure as it read in 1957 provided that the court "shall not accept the plea without first determining that the plea is

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* Although appellant was of course in no sense barred from making the application giving rise to this appeal, the substantial lapse of time between the entry of his plea and his present claim of constitutional infirmity casts some doubt upon his good faith and credibility. *Kelley* v. *United States*, 299 F. Supp. 1367 (S.D.N.Y. 1969); *Rakes* v. *United States*, 231 F. Supp. 812 (W.D. Va. 1964), *aff'd* 352 F.2d 518 (4th Cir. 1965); *Parker* v. *United States*, 358 F.2d 50 (7th Cir. 1965), *cert. denied*, 386 U.S. 916 (1967).

made voluntarily with an understanding of the nature of the charge." * In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Supreme Court held that the requirements of Rule 11 must be literally complied with on the record and that the failure to do so would render the resulting plea invalid. The Court subsequently held in *Halliday* v. *United States*, 394 U.S. 831 (1969), however, that *McCarthy* was not to be given retroactive application. It is thus settled that noncompliance with Rule 11, standing alone, does not render invalid guilty pleas entered prior to the decision in *McCarthy*. Rather, as Judge Friendly made clear in *Grant* v. *United States*, 451 F.2d 931, 933 (2d Cir. 1971), such a plea is subject to attack "only on the basis of involuntariness in the constitutional sense." See *Machibroda* v. *United States*, 368 U.S. 487 (1962). More specifically, such a plea may be found involuntary only if the defendant lacked the knowledge necessary for an intelligent waiver of his rights and if it can be demonstrated that his ignorance actually contributed to his decision to plead guilty. *Grant* v. *United States*, *supra*; *Korenfeld* v. *United States*, 451 F.2d 770, 774-75 (2d Cir. 1971), *cert. denied*, 406 U.S. 975 (1972); *Aiken* v. *United States*, 71 Civ. 5328 (S.D.N.Y. Dec 5, 1973).

In the instant case, Fiore failed to allege facts sufficient to entitle him to relief, or even to a hearing on the issues he raises. As to the consequences of his plea, Fiore fails to allege at any point that he was not in fact

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* Rule 11 was amended in 1966 to further require the Court to address the defendant "personally," to determine that the plea is made by the defendant with an understanding of the "consequences of his plea," and that there is a "factual basis for the plea."

aware of the consequences of his plea.* With respect to the broader claim which he now raises on appeal, Fiore also fails to allege at any point that he did not in fact understand the nature of the charges against him.** Beyond these critical deficiencies in Fiore's petition, and even assuming *arguendo* that he was ignorant of these elements, Fiore nowhere alleges that such ignorance had any effect on his decision to plead guilty or that had he been so informed by the court, he would not in fact have pleaded guilty. Accordingly, appellant has failed to allege facts giving rise to a colorable claim, much less entitling him to a hearing thereupon, under the law as enunciated in *Grant* v. *United States*, *supra* and *Korenfeld* v. *United States*, *supra*.

Aside from the failure to raise any issue of fact such as to require a hearing, the petition also ran afoul, as the district court found, of the requirements of this

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* Indeed, it was unclear from Fiore's petition whether he was complaining of the failure of the court to advise him (a) of the maximum possible sentence or (b) of the possible consequences should he later be convicted of a second offense. The District Court thus dealt with both claims, finding that (1) petitioner had failed to allege "that he was not aware of the sentencing possibilities and that he would not have plead guilty had he known of those possibilities," and (2) that the court was not required to advise him at the time of his plea to a first federal offense, of the consequences which would attach should he at some time in the future commit a second such offense, citing *Weinstein* v. *United States*, 325 F. Supp. 597 (C.D. Cal. 1971).

** Indeed, it would be most surprising were he to do so. Aside from the fact that he had a copy of the indictment and that the charges were explained to him in layman's language by the court clerk, Fiore was no neophyte in his dealings with the narcotics laws, having been previously convicted of multiple state narcotics offenses. *Cf. United States* v. *Davis*, 212 F.2d 264, 267 (7th Cir. 1954).

Court in *United States* v. *Welton*, 439 F.2d 824, 826-27 (2d Cir.), *cert. denied*, 404 U.S. 859 (1971) and *Korenfeld* v. *United States*, *supra*, 451 F.2d at 774-75. Mindful of the ease with which the minimal allegations of ignorance necessary to require a hearing could be made, baseless though they might be, Judge Lumbard, writing for the court in *Welton*, held that:

> "We see no point in burdening the district courts of this circuit by requiring many fruitless hearings upon nothing more than the assertions of defendants who, under the stimulus of our *Bye* decision, will claim a lack of knowledge of their ineligibility for parole. As a minimum, before proceeding to hold a hearing on such a claim, the district court should require that the defendant submit an affidavit of his attorney in support of his claim or his own affidavit giving a satisfactory explanation of why he cannot submit an affidavit from his attorney. [cites omitted]. In any event, the petitioner must categorically waive his privilege regarding any advice he received or any conversation or communication he may have had with any attorney on the subject of pleading guilty, the consequences thereof and the reasons for his entering the plea.
>
> "Welton's petition falls far short of this standard. He merely claims that he had not been advised of his ineligibility for parole, but fails to allege that had he known of his ineligibility, he would not have pleaded guilty. Nor does he substantiate his present counsel's conclusory allegation that no one informed him of the unavailability of parole. . . .
>
> "In any event, in view of Welton's failure personally to allege or substantiate that he did not know that he would be ineligible for parole,

> if convicted, or to allege that he would not have pleaded guilty had he known, Judge Bruchhausen was correct in dismissing his petition without a hearing." 439 F.2d at 826-27.

These requirements were reaffirmed in *Korenfeld* v. *United States*, *supra*, 451 F.2d at 775, and in *Grant* v. *United States*, *supra*, 451 F.2d at 933.*

Here too, the district court found that Fiore had failed to comply with the requirements of *Welton* in that the petition made no claim that "he would not have pleaded guilty had he known" the facts about which he now claims he was not explicitly informed. *Welton* v. *United States*, *supra*, 439 F.2d at 826. Accordingly, the district court's decision denying him relief without a hearing was in all respects proper and in accordance with the explicit direction of this Court in *Welton*, *Korenfeld* and *Grant*.

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* Indeed, a similar concern was expressed by the Supreme Court in *Machibroda* where the Court required that petitions pursuant to section 2255 contain "charges which are detailed and specific," 368 U.S. at 495, and in *Fontaine* v. *United States*, 411 U.S. 213, 214 (1973) where the Court required "detailed factual allegations regarding the alleged circumstances" giving rise to the motion.

CONCLUSION

The order of the district court denying the motion should be affirmed.

Respectfully submitted,

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JERRY L. SIEGEL,
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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JERRY L. SIEGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of September, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Joseph Fiore
U.S. Penitentiary
Atlanta, Georgia 30315

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jerry L. Siegel

Sworn to before me this
3rd day of September, 1976

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977